No. 78-872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., *et al.*,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY OF PETITIONERS

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REPLY OF PETITIONERS

This reply is submitted by petitioners—the principal Western, Eastern, and Southern railroads ("the railroads"), in response to the memorandum in opposition to certiorari filed by the federal respondents ("Gov. Mem.") and briefs in opposition filed by National Association of Recycling Industries, Inc. *et al.* ("NARI Br."), and Institute of Scrap Iron and Steel, Inc. ("ISIS Br.").[1] Memoranda in support of certiorari

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[1] Opposition briefs were also filed by two companies: Northwestern Steel and Wire Company and Fort Howard Paper Company. These briefs, however, essentially repeat arguments contained in the principal oppositions.

have been filed by the American Paper Institute, Inc., and Armco Steel Corporation, *et al.*[2] None of the arguments made in opposition disprove the railroads' basic contention: that the lower court has improperly invaded the substantive and procedural province of the Commission and has disregarded directly controlling decisions of this Court, including *SCRAP II* and *Transcontinental*.[3]

1. The federal respondents, without endorsing the lower court's decision,[4] assert that plenary review is not warranted. This conclusion rests on the assumption that the lower court merely "applied established principles of judicial review" to the agency's decision. Gov. Mem. 2. That assumption is manifestly incorrect. It is the lower court's very disregard of those principles that warrants review.

The lower court itself conceded that the substantive standards of discrimination and reasonableness applied by the Commission had not been altered by Congress. Pet. 12; Gov. Mem. 4. Consequently, the lower court was reduced, in reversing the Commission, to a spate of disagreements about the agency's analysis and

[2] The American Paper Institute represents over 90 percent of the United States' pulp, paper and paperboard industry. Armco Steel was joined in its memorandum by Inland Steel Company, Republic Steel Corporation and Youngstown Sheet and Tube Company.

[3] *Aberdeen & R.R.R.* v. *SCRAP*, 422 U.S. 289 (1975); *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326 (1976).

[4] Below, the Commission vigorously sought to sustain its own decision. The United States criticized the agency decision but did so primarily on the ground—rejected by the lower court—that Congress had altered the discrimination standard. See Pet. 8-9 and n.13.

its evaluation of individual pieces of evidence. Pet. 10, 12-14; see Gov. Mem. 2.[5] Quite apart from the factual and analytical errors that the lower court committed in this process (Pet. 14-16), this type of appellate scrutiny is *not* consistent with "established principles of judicial review," for this Court has repeatedly emphasized that the evaluation and weighing of evidence is for the expert agency and not for the reviewing court. See Pet. 12-14. Maintenance of that principle clearly merits certiorari.

The Court applied this very principle delimiting judicial review in *SCRAP II* where, in similar circumstances, it reversed the lower court's decision in that case and found that the Commission's evaluation of recyclable rates was entirely adequate under the principles governing judicial review. There, as here, Chief Judge Wright "simply disagreed" with the Commission's decision on the merits. 422 U.S. at 322. It would be squarely inconsistent with *SCRAP II* to allow the lower court now to reverse the ICC's subsequent decision which is, if anything, even more thorough, elaborate and emphatic in its conclusion that recyclable rates do not discourage the movement of recyclables.

On the other issue presented by the railroads' certiorari petition—the illegality of the six-month time limit fixed for further proceedings—the Government memorandum states that the Commission "does not believe that such time limits are appropriate" and it cites

[5] These disagreements are nothing other than an invasion of the agency's factfinding and evaluation process; and their substance is not altered by rhetorical references to the "mandate of Section 204." Gov. Mem. 2. The statute mandates nothing except use of traditional standards and those standards are exactly what the Commission applied.

this Court's *Transcontinental* opinion, holding that such a limitation is clearly improper. Gov. Mem. 4. As the petition explained, the artificial and unlawful time constraint on remand threatens the railroads, not the Commission, because it is the railroads who bear the burden of proof. Accordingly, since the limitation is clearly unlawful under *Transcontinental,* summary reversal of this directive is plainly warranted even if the Court does not grant plenary review on the remand itself.[6]

2. NARI has submitted a lengthy opposition devoted largely to NARI's own factual and legal attacks on the lawfulness of the rate structure. These arguments were not adopted by either the Commission or the lower court and are irrelevant to the questions before this Court—whether the lower court overstepped the established bounds of judicial review in vacating the agency decision and imposed unlawful constraints on the Commission's disposition of the remanded proceedings.

NARI's principal defense of the lower court's decision is based on the repeated suggestion that Congress, in Section 204, mandated revision of railroad rates on recyclables absent an extraordinary showing and that the lower court was merely enforcing that mandate. NARI Br. 20, 29, 39. This contention is simply incorrect: Congress did not alter existing substantive stand-

[6] Only recently, this Court summarily vacated a procedural constraint imposed by the lower court on remand, where this Court deemed the constraint unlawful but did not believe that the lower court's decision on the merits warranted review. *Long Island R.R.* v. *Aberdeen & R. R.R.*, 47 U.S. L. W. 3263 (No. 77-1515, Oct. 16, 1978).

ards, preordain the resolution of disputed issues like competition, or rule that recyclers should be subsidized or specially favored by the struggling rail industry.[7] It required only that the railroads prove that their rate structure was lawful under existing standards. Even the lower court did not accept NARI's construction of the statute, and NARI's contentions do not support the decision.[8]

NARI also seeks to present its own "factual" arguments allegedly to show that rail rates on recyclables have been increased to a burdensome level or impose discriminatory constraints on recycling. *E.g.,* NARI Br. 7, 13, 15-16. Yet the Commission's unimpeached environmental impact statement in this case demonstrates—by economic measurements, past experience, and industry analysis—that the railroad rate structure has *no* significant impact on the level of recycling. See Pet. App. 1g. If, as the Government respondents suggest, "Congress' major concern was the removal of [any] rate structures that impeded or discouraged development of industrial recycling" (Gov. Mem. 3), that concern was amply met by the Commission's evaluation.

NARI also argues that the six-month time limit on the proceedings was "pursuant to" statute. NARI Br. 43. This is clearly incorrect. In fact the lower court, which considered the statute at length, did not itself

[7] The recycling industry did urge such bills upon Congress, but Congress refused to enact them. See Pet. 5.

[8] NARI's arguments do not constitute an alternative ground for sustaining the decision below; those arguments would, if accepted, lead to an entirely different remand than that ordered by the lower court.

think to impose any time limit in its initial decision; the six-month deadline was adopted solely because NARI later suggested it. Congress, of course, gave the Commission one year to complete its investigation. Only Congress has the authority to alter that period or impose new limitations. The Commission did not delay, but moved expeditiously to complete its investigation in one year. The lower court had neither justification nor authority to impose a shortened deadline of its own. *FPC* v. *Transcontinental Gas Pipe Line Corp., supra,* 423 U.S. at 333.

3. ISIS claims that remand was justified because the Commission allegedly shifted the burden of proof from the railroads to the shippers in violation of Section 204. ISIS Br. 7. In fact, the Commission repeatedly and expressly held that the burden was on the railroads, and when in a few instances it believed that the railroads failed to satisfy the burden, the Commission resolved individual issues against them. Pet. 9 n.14. The passages from the ICC decision cited by ISIS do not show that the Commission ever shifted that burden.[9] The ICC considered the shippers' failure to come forth with any evidence only where the railroads had already presented evidence to support their burden of proof and the Commission was looking to the shippers to produce evidence in opposition. This is both

[9] For example, ISIS notes that the ICC stated that the railroads "failed to show comparisons." ISIS Br. 7 n. 13. The railroads had in fact submitted the evidence for such comparisons, and the Commission itself made the comparisons in its decision. Similarly, there is no force to ISIS' claim based on the Commission's rejection of some of the railroads' repetitive movements; the Commission specifically found that the several thousand remaining ones were adequate evidence.

logical and accepted practice and does not represent a shift in the ultimate burden of proof. *Speiser* v. *Randall,* 357 U.S. 513, 524 (1958).

ISIS also suggests that the lower court's remand was proper because the ICC erroneously gave greater weight to railroad profitability than to environmental considerations. ISIS Br. 8. In fact, the lower court's discussion of this point reveals an error by the lower court, not by the Commission. Contrary to the lower court's intimation (Pet. App. 28b-29b & n.62), the Commission never suggested that it would sustain unlawful rates based on railroad revenue need or give controlling weight to this factor. The Commission said only that revenue need "will be considered" (Pet. App. 50d) as one of a number of relevant factors. *E.g.,* Pet. App. 8d, 319d. Under traditional ratemaking standards, which Congress adopted in Section 204 (see Pet. 9), this was clearly permissible and appropriate.[10]

ISIS next argues that, although the Commission properly stated the standards for determining lawfulness, the Commission did not properly apply them. In particular, ISIS says that the lower court found that the Commission erred in considering only the actual competitive injury and not the *potential* competitive impact of freight rates on recycling. As the railroads pointed out in their petition, the Commission clearly did consider potential impact and the lower court's contrary belief was based on its own misunderstanding. Pet. 15-16. Much of the Commission's analysis was devoted to the question of transportation elasticity—the potential impact of different freight rates on recycling.

[10] See Section 15a(4) of the Interstate Commerce Act, now codified in 49 U.S.C. § 10704(a)(2).

The Commission found, as it had in numerous previous investigations of this question, that any such impact of freight rates on recycling is insignificant.

Finally, ISIS incorrectly argues that the lower court's decision is "interlocutory" and not ripe for review. ISIS Br. 3, 12. The lower court has, by its decision, overturned a completed agency decision which, under correct standards of review, should have been affirmed, and *SCRAP II* is ample precedent for immediate review in this Court. Moreover, this may well be the *only* opportunity the railroads will ever have to obtain review of the agency's own decision under proper standards.[11] In all events, the railroads have now shown that recyclable rates are lawful, Congress' mandate has been satisfied, and the lower court should not be allowed to require more proceedings merely because it does not agree with the Commission's determination of transportation issues.

[11] As the petition demonstrated, there is a continuing danger that the Commission under the pressure of the lower court's opinion will abandon its position and order unjustified rate revisions. Pet. 24-25. Obviously the limited opportunity to attack such an agency order in court is not a substitute for affirmance of this order.

CONCLUSION

For the reasons stated above and in the railroads' petition, plenary review should be granted. Alternatively, if the Court does not grant plenary review, the lower court's order imposing a time limitation on remand should be vacated summarily on the authority of *Transcontinental.*

Respectfully submitted,

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